or for an account of his administration on the footing of wilful default. By consent the 1st, 2nd and 3rd plaintiffs succeed in their claim to have the deed of release set aside. In consequence all the plaintiffs succeed in their claim against the 1st defendant for administration of the deceased's estate. The claim of all the plaintiffs against the 2nd defendant fails, and he is entitled to judgment.

Question of costs reserved for further argument.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]
TERRELL, J.A.
February 19, 1940.

IN RE A MEMORANDUM OF CHARGE DATED 17th OF DECEMBER 1935.

A. R. P. L. RAMANATHAN CHETTIAR

vs.

CHEANG SUNNY.

[SINGAPORE ORIGINATING SUMMONS No. 49 of 1937]
[AMENDED SUMMONS IN CHAMBERS No. 205 of 1939]

Practice—Sale wholly out of Court—Application —order—absence of prefatory declaration—irregularity —ex parte order—Rules of the Supreme Court, 1934, 0.48 r.2: 0.53 r.17(1); 0.63 r.1.

Before making an order for sale out of Court under Order 48 Rule 2 of the Rules of the Supreme Court, 1934, it is the duty of the Court or a Judge to require evidence that all persons interested in the estate to be sold are before the Court and the order should be prefaced with a declaration that the Judge is satisfied that all such persons are before the Court and with a statement of the evidence upon which the declaration is founded. Any order made without regard to the provisions of this rule may be set aside. Discretion of Court in setting aside an **exparte** order.

Cases referred to:—

(1) *Farden v. Richter,* 23 Q.B.D. 124.

(2) *Pitt v. White,* 57 L.T. 650.

SUMMONS IN CHAMBERS by the defendant to set aside an *exparte* Order of the Judge dated the 6th May, 1937.

[The above decision does not lay down any new law but is reported for the sole purpose of emphasising the necessity of strictly following the procedure laid down in Order 48 Rule 2 in all cases where an order for sale out of Court is sought. The provisions of this rule, it seems, have on more than one occasions been overlooked by practitioners of the Colony.

It must also be noted that even if there is an objection to the order which appears on the face of it a purchaser is not entitled to object to the title on that account as the irregularity even if appearing on the face of the order is cured by the Conveyancing and Law of Property Ordinance, Section 75 (the equivalent of the English Section 70). See **in re Hall Dare's Contract,** 21 Ch. Div. 41 (C.A.) and **Mostyn v. Mostyn,** (1893) 3 Ch. 376.—Ed. M.L.J.]

The facts and arguments are sufficiently related in the judgment below.

Aditan for the defendant (applicant).

Green for the plaintiff (respondent).

Cur. Adv. Vult.

Terrell, J. A.—The defendant applicant had an interest in the estate of his father Cheang Jim Hoe, and of his grandfather Cheang Hong Lim. On the 24th April, 1931, the applicant was adjudicated a bankrupt, and his property vested in the Official Assignee. On the 27th July, 1934, he obtained his discharge subject to a judgment for $600 which has not yet been fully satisfied. It is clear that, even after his discharge, any property of the bankrupt which belonged to him prior to his bankruptcy was still vested in the Official Assignee, and that the bankrupt was only entitled to the surplus, if any.

On the 17th December, 1935, the applicant executed a charge upon his share in his father's and grandfather's estates in favour of the plaintiff to secure moneys due, or to be due, on current account up to a total amount of $1,500 with interest at 24 per cent. per annum. At the same time the applicant executed a promissory note for $1,400 repayable by 20 instalments. It is not disputed that no payment was made in respect of the promissory note, or that written demand for payment was made on the 5th March, 1937, and that such demand was not complied with. Thereupon the plaintiff was in a position to enforce his security by sale under the provisions of the Conveyancing and Law of Property Ordinance.

Before this notice of demand was given there had been correspondence between the plaintiff's solicitors and Messrs. Zehnder Bros. who were solicitors for the executrix of Cheang Jim Hoe's estate, with reference to a proposed garnishment of the applicant's interest, and on the 4th March, 1937, another client of Messrs. Zehnder Bros., one Low Phua Min, offered to buy the properties comprised in the charge for $1,000 together with interest at 15 per cent. from 17th December, 1935. Messrs. Zehnder Bros. were not willing to accept an assignment in pursuance of the plaintiff's power of sale, and first of all suggested that the plaintiff should foreclose, as there might be difficulties in preparing particulars and conditions of sale in the case of a sale by auction. Later Messrs. Zehnder Bros. suggested an application to Court to sell by private treaty. This proposal was accepted by the plaintiff's solicitors on the 5th March, 1937, and they proceeded to prepare their application to Court and the affidavit in support. These documents were

approved by Messrs. Zehnder Bros., and on the 22nd March, 1937, the Originating Summons was filed. The Originating Summons asks for an order "That the plaintiff be at liberty to sell out of Court by public auction with or without reserve or by private treaty, all that the property of the defendant described in the Schedule hereto etc."

The application is entitled "In the matter of Order 52 Rule 4" which enables a mortgagee to apply by Originating Summons to enforce his security by sale, foreclosure, etc. An order for sale under this rule results in a sale by the Court. A sale out of Court can only be made under the provisions of Order 48 Rule 2. I mention this as Mr. Green argued that this was a simple application under Order 52 Rule 4, while in fact it was an application asking the Court to invoke the special provisions of Order 48 rule 2. There is no substance in Mr. Green's argument that Order 48 only applies to a sale of immovable property. This may be correct of Order 48 rule 1, but it is certainly not correct of Order 48 rule 2, which is far wider in its terms. In any case the order asked for, and subsequently made, could not have been under the provisions of Order 52 rule 4 without invoking the aid of Order 48 rule 2.

It is to be noted that the whole object of the application was to sell the property to a particular purchaser at an agreed price, and that being the case, an application could have been made under Order 52 rule 1 (1) (f) to approve a conditional contract. No doubt if such an application had been made the Court would have required to be satisfied that the price offered was a fair price.

One can only speculate why the application included a prayer that the property might be sold "by public auction with or without reserve" when the plaintiff's sole intention was to sell by private treaty, but there is clearly a possibility that the Court was thereby misled into making the order which was subsequently made. The affidavit in support gave no hint that a private sale had already been agreed upon, and the negotiations set out above were only disclosed in an affidavit filed on behalf of the plaintiff on the 14th February, 1940.

The plaintiff had some difficulty in serving the defendant, but eventually did so on April 22nd, 1937. The defendant entered an appearance in person and gave an address for service. He did not, however, quite appreciate the nature of the proceedings, as in his appearance as filed he asked for a statement of claim. He was not present when the Originating Summons was heard, and an order was made in his absence on the 6th May, 1937. The plaintiff lost no time in acting upon the order, and the sale to the purchaser for $1,225 was carried through on the 31st May, 1937. Although the defendant appeared in person, and had signed his appearance in an unusual form and was absent at the hearing, the plaintiff's solicitors did not seem to think it necessary to serve him with a copy of the order. In the result the sale was carried through without the defendant being aware that he had lost the whole of his interest in his father's and grandfather's estates. I do not hold that service of the order was obligatory (see *Farden v. Richter*,[1]). The order, however, gave the plaintiff "the costs of and incidental to the application and consequent thereon", and under such an order the plaintiff would have been entitled to be paid the costs for making a copy of the order and for serving it on the defendant and this is the usual practice. The failure to give the defendant express notice of the order enabled the plaintiff to carry through the sale without the defendant having an opportunity of setting aside the order obtained in his absence. When once the sale had been carried through the purchaser would have the benefit of section 75 of the Conveyancing and Law of Property Ordinance.

The order was only served on the defendant on the 22nd July, 1938, after he had appointed solicitors to act on his behalf.

After service of the order there was correspondence between the solicitors. The defendant ultimately applied on the 6th April, 1939, to set the order aside. On the 28th April 1939 the summons was amended at the instance of the plaintiff and various reasons for setting aside the order on the ground of irregularity were incorporated in the summons so as to comply with Order 63 rule 3.

The defendant made his application under two heads: (a) to set aside an order made *ex parte* under the provisions of Order 51 rule 17 or Order 53 rule 4 (this is a matter of the indulgence of the Court), and (b) to set it aside on the ground of non-compliance with the rules under Order 63 rule 1. Non-compliance may be a mere irregularity and be subject to the discretion of the Court, or it may involve a want of jurisdiction, in which case the order must be set aside *ex debito justitiae*. The special grounds are only necessary so far as the application is under Order 63 rule 1.

As regards (a), Mr. Green argued that the order was not *ex parte*. I cannot accede to this argument. An *application* is *ex parte* if there is no respondent to the summons, and I agree that an application where

there is a respondent is not *ex parte*. The *order*, however, is *ex parte*, whether there is no respondent to the summons, or whether there is a respondent and the order is made in his absence. In the latter case the absent respondent may apply to set aside the order when it is brought to his notice subject to certain well established conditions, viz. he must explain his absence, he must show merits, and he must make his application within a reasonable time.

In my opinion, the failure to attend on the 6th May, 1937, is sufficiently explained by his ignorance of the procedure, and the fact that at that time he had no professional advice.

As regards the merits, I disregard the defendant's attack on the charge itself, and the suggestion that it was only given to support litigation. Such matters cannot be raised upon an Originating Summons and if the defendant had wished to attack the charge itself there are other means of doing so. The defendant has, however, sworn that the sum of $1,000 was never advanced as alleged in the plaintiff's affidavits. This might entitle him, before an order for sale were made, to have the accounts taken, no specific sum being mentioned in the charge itself, which was only to secure the balance due on a current account. It is also alleged by the defendant, and not denied by the plaintiff, that the sale was at an undervalue. The defendant, if present at the hearing, would have been entitled to insist that a sale should be subject to a reserve, or if by private treaty, not below a price fixed by the Court. These two matters are sufficient, in my opinion, to show that the applicant has merits.

The only other consideration is whether the application was made in time. Order 51 rule 17 (1) says that the party failing to attend must not be guilty of wilful delay or negligence. Order 53 R 4 (2) says the application must be made promptly. In this case the defendant was not in default until he had notice of the order on the 22nd July, 1938. Nevertheless he did not make his application until the 6th April, 1939, nearly 9 months later, and under ordinary circumstances I should consider the delay too great to entitle him to the indulgence of the Court. But there are peculiar circumstances in this case which lead me to the conclusion that the rules should not be interpreted too strictly against the defendant. It appears from the correspondence attached to the defendant's affidavit of the 5th April, 1939, that he instructed his solicitors to make the application as early as 17th August, 1938, and thereafter there was a delay on the part of the plaintiff's solicitors for which the defendant was not responsible (see letters of the 6th and 16th September, 1938). But my chief reason for holding that the delay is not a fatal objection is that the Court must always be vigilant to see that the rules devised for the benefit of litigants are not used to defeat the ends of justice, and I am influenced by the fact that the original application for leave to sell was not straightforward in that it did not put the Court in the possession of vital facts, e.g., that the sale was to be at an agreed price to an agreed purchaser, and that the plaintiff had no knowledge of the value of the property to be sold. The procedure of a sale by the Court is no doubt a somewhat cumbersome and expensive procedure, but it has the merit of protecting the parties interested. If the Court is asked to avoid this expense by ordering a sale out of Court, it is incumbent upon the applicant to put the Court in possession of all necessary facts in order that the Court may be satisfied that, notwithstanding a sale out of Court, the interests of parties will nevertheless be properly protected. The procedure adopted by the plaintiff prevented the Court from being in a position properly to exercise its discretion, and the protection contemplated by the orders and rules became illusory. I have also referred to the fact that the order was never served until months after the sale had been effected. Even if service is not enjoined by the rules, it was obviously a case in which, in fairness to the defendant, an order of a most unusual character, and which, as will be seen, did not comply with the provisions of order 48 rule 2(3), should have been served promptly so as to give the defendant an opportunity of applying to set it aside before it had been acted upon. Further I understand that the position as regards the property transferred did not alter between July 1938, when the application might have been made, and April, 1939. The plaintiff, therefore, is in no way prejudiced. For these reasons I consider that the delay should not preclude the defendant from making the present application.

It is now necessary to consider the argument that the order did not comply with the express provisions of Order 48 rule 2.

If the Order has not been complied with then the Court has a discretion under Order 63 rule 1 to set the order aside as irregular. Under rule 2 the application must be made within a reasonable time, and under rule 3 the grounds of objection must be stated. As regards time, it appears to me that similar considerations apply as in the case of an application to set aside an *ex parte* order, but if the party who obtained the order is responsible for the irregularity the Court will be likely to be more indulgent in the

case of an application to set it aside. This will certainly be the case if the order should be set aside *ex debito justitiae*. The grounds of objection are sufficiently set out in the amended summons. It is true that such grounds include several which cannot, in my opinion, be considered in these proceedings, but the particular matters referred to below are all covered by the grounds as filed.

Order 48 rule 2 lays down the procedure where the Court allows a sale out of Court and it will be convenient to set out the provisions of the Order in full:—

> 2.—(1) In all cases where a sale, mortgage, partition, or exchange is ordered, the Court or a Judge shall have power, in addition to the powers already existing, with a view to avoiding expense or delay, or for other good reason, to authorise the same to be carried out either as at present—
>
> (a) by laying proposals before the Judge in Chambers for his sanction; or
>
> (b) by proceedings altogether out of Court, any moneys produced thereby being paid into Court, or to trustees, or otherwise dealt with as the Judge in Chambers orders.
>
> (2) The Judge shall not authorise the said proceedings altogether out of Court, unless and until he is satisfied by such evidence as he deems sufficient that all persons interested in the estate to be sold, mortgaged, partitioned, or exchanged are before the Court, or are bound by the order for sale, mortgage, partition or exchange.
>
> (3) Every order authorising the said proceedings altogether out of Court shall be prefaced by a declaration that the Judge is so satisfied as aforesaid, and a statement of the evidence upon which such declaration is made.

It will be seen that even when the sale is altogether out of Court the rule contemplates the proceeds of sale being paid into Court unless the Court otherwise orders and Kay J. in *Pitt v. White*,[2] laid down the following rules:—

> "Whenever I make an order for sale out of Court, I require three things—namely, that the reserve bid should be fixed by the chief clerk; that the auctioneer's remuneration should be similarly fixed, and that the purchase money should be paid directly into Court. The directions as to the auctioneer's remuneration, as well as the reserve bid, must be mentioned in the order."

I do not say that there may not be circumstances in which such rules may be relaxed, but the ruling of this learned Judge indicates the vigilance of the Court of Chancery in England where parties wish to avail themselves of the special porcedure for the purpose of avoiding the expense of a sale under the supervision of the Court.

Order 48 rule 2 (2) makes it mandatory that there shall be evidence that all persons interested in the estate to be sold are before the Court, and Order 48 rule 2 (3) likewise makes it mandatory that the order shall be prefaced by a declaration that the Judge is satisfied that all such persons are before the Court and a statement of the evidence upon which the declaration is founded. The affidavit in support of the summons does not state that the defendant is the only person interested. In fact the Official Assignee is also interested, but, as Mr. Aditan has pointed out, the irregularity is not so much that the inference that the defendant only was interested is wrong, as that the rule that the interests should be stated has not been complied with. It is not disputed that the formal order makes no attempt whatever to comply with the provisions of Order 48 rule 2 (3). I am inclined to think Mr. Aditan is right in his argument that if the conditions laid down in a mandatory form for the exercise of the Court's discretion are completely disregarded, the order is made without jurisdiction, and is not a mere irregularity as contemplated by Order 63 rule 1. In that case the order must be set aside *ex debito justitiae*. If I am wrong in this view, then I feel no doubt that the Court should exercise its discretion by setting the order aside as irregular.

I think, therefore, that the applicant is entitled to have the order set aside both as being an *ex parte* order made in his absence, and as an order which was made either without jurisdiction or which at all events was irregular upon the face of it.

It may be that this order will not be of much assistance to the applicant, as it will not be binding on the purchaser who is not a party to these proceedings.

As regards costs, a simple application to set aside *ex parte* order for the purpose of rehearing usually results in the applicant paying the costs as a condition of the matter being reopened. Here however the plaintiff has resisted the reopening of the application to the last, and although the applicant has sought to raise matters which I have ruled could not be raised and has been obliged to amend his summons, and has been guilty of delay in making his application, he has substantially succeeded in his contention. So far as the application is based on non-compliance there is no reason why the party who was responsible for obtaining an improper order should not pay the costs of having it set aside. Taking everything into consideration I award the applicant half the taxed costs of and incidental to the application.

Application allowed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.